U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 2 7 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On Form I-140, Immigrant Petition for Alien Worker, the petitioner describes its business as '[redacted]'[1] It seeks to employ the beneficiary permanently in the United States as an "electrical engineer technician."[2] The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the labor certification does not require a member of the professions holding an advanced degree. The director denied the petition accordingly on April 29, 2013.

At issue in this case is whether: (1) the position offered, as described on the labor certification, qualifies for the classification sought; (2) whether the beneficiary possesses an advanced degree as required for classification as a professional holding an advanced degree; and (3) whether the petitioner can establish its ability to pay the proffered wage for the position offered from the priority date onward.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[3] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] A petition that fails to comply

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[1] This statement in Part 5, Item 2 on Form I-140 appears to be in error. The petitioner's website states that it is a "residential Audio/Video, Lighting Control, and Home Automation" company. *See* [redacted] (accessed November 21, 2013).

[2] Form I-140, Part 6, Item 1 lists the job title as "Electrical Engineering." A letter from the petitioner's Chief Financial Officer, dated July 10, 2012, states that the petitioner intends to employ the beneficiary "in the position of Electrical Engineering." The position offered, as certified by the U.S. Department of Labor and as stated in Part H.3 of ETA Form 9089, is that of an "Electrical Engineering Technician."

[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[5]

Successor-In-Interest

As required by statute, the petition is accompanied by a labor certification, approved by DOL.[6] The priority date of the petition is March 10, 2008.[7] The employer who initially filed the labor certification application was with the Federal Employer Identification Number (FEIN) of The petitioner, (FEIN , asserts that it merged with the labor certification employer on December 2, 2009, and is a successor-in-interest to the labor certification employer. The petitioner submitted a copy of a Certificate of Merger showing that on that certificate was filed with the State of New York, Department of State, under Section 904 of the Business Corporation Law in the State of New York. The certificate states that the surviving corporation of the merger is , the petitioner.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third group includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

A true merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property, such as real estate, machinery, or intellectual property, to another business organization.

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[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

[6] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[7] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[8] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

The record does not document the terms of the merger, and provides no explanation by which to determine which type of merger, if any, the petitioner's purported merger parallels. The Certificate of Merger, Fifth part, indicates only that a separate "agreement and plan of merger setting for the terms and conditions of the merger of said corporations" exists. However, this "agreement and plan" is not in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the New York State Division of Corporations indicates that the labor certification employer, [redacted], was in existence until its dissolution on January 25, 2012, which is several years after the purported merger in December 2009.[9] The continued existence of the labor certification entity after the time of the purported merger, and the lack of documentation explaining the terms and conditions of the merger, cast doubt on the claimed merger and fail to establish whether the petitioner is a successor-in-interest to the labor certification employer.[10] *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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[8] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

[9] *See* New York Department of State, Division of Corporations, *Corporations, State Records, and UCC,* http://www.dos.ny.gov/corps/bus_entity_search.html (accessed November 21, 2013).

[10] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

In any further filings, the petitioner should provide evidence of its purported merger terms, including the "agreement and plan of merger setting for the terms and conditions of the merger of said corporations," as identified in its Certificate of Merger, as well as evidence that the labor certification entity ceased to exist after the merger. *Matter of Ho*, 19 I&N at 591-592, states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Even if the petitioner is able to document that it is a successor-in-interest to the labor certification employer, the requirements for the position offered, as set forth on the approved labor certification, have not been shown to meet the regulatory requirements for the classification sought.

Minimum Requirements of the Position Offered

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's Degree in Electrical Engineering.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: "Knowledge of computer programming such as AutoCAD."

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in Electrical Engineering from the New York, completed in 2006. The record contains a copy of the beneficiary's diploma from the issued in 2006.

In addition to the beneficiary's employment with the labor certification employer, Part K of the labor certification states that the beneficiary possesses the following employment experience:

- As a part-time Senior Design Analyst with New York from January 2, 2005, until June 1, 2005.
- As a part-time System Control Designer with New York from August 1, 2004, until December 31, 2004.

The beneficiary's part-time employment with the [redacted] appears to have occurred while the beneficiary was enrolled at that university and while he pursued his bachelor's degree. The beneficiary's employment with the labor certification employer as an "Electrical Engineer Techn" began on July 5, 2005, prior to the completion of his bachelor's degree in 2006.

The Roles of the DOL and USCIS in the Immigrant Visa Process

Prior to analyzing the minimum requirements for the position offered, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[11] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did

[11] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or

professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

The Position Offered Requires Less Than a Professional Holding an Advanced Degree

As stated above, the plain terms of the labor certification indicate that the position offered requires: (1) a bachelor's degree in Electrical Engineering; and (2) twelve months of experience in the position offered. As defined by regulation, a bachelor degree alone is not an advanced degree. In order for a position, which requires only a baccalaureate, to meet the regulatory requirements of the classification sought herein, the terms of the labor certification must also require, at a minimum, five years of progressive experience in the specialty. 8 C.F.R. §§ 204.5(k)(2), (3)(i). However, the labor certification at issue requires a bachelor's degree and only 12 months of experience in the position offered.

As an individual can qualify for the offered position with less than a degree above a baccalaureate, or a baccalaureate followed by five years of progressive experience in the specialty, the petition does not qualify for advanced degree professional classification.

In the brief accompanying this appeal, counsel asserts that "USCIS is incorrect because a labor certification or ETA Form 9089 is not always required since it can be waivered [*sic*] under a Labor Certification National Interest Waiver (NIW). It was error for the USCIS not to consider an NIW."[12] It appears that the petitioner asserts, for the first time on appeal, that the beneficiary need not satisfy the education or experience requirements of the included labor certification as the beneficiary was

[12] The petitioner's brief does not assert that the beneficiary is an alien of extraordinary ability, or that beneficiary's work is in the national interest. On February 19, 2013, the director of the Texas Service Center issued a Notice of Intent to Deny (NOID) stating that the petitioner had failed to establish that the beneficiary met the experience and education requirements of the labor certification or the classification sought. The petitioner responded to the NOID but did not assert that the labor certification was unnecessary as the petitioner was entitled to a national interest waiver. The purpose of the NOID was to notify the petitioner of deficiencies in the record and to give the petitioner an opportunity to overcome those deficiencies through the submission of additional evidence. The petitioner did not at that time assert that the petitioner was entitled to a national interest waiver or present any evidence in that regard. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner's assertion, for the first time on appeal, that the petitioner is entitled to a national interest waiver, need not be considered. Even if the national interest assertion were considered on appeal, it would not be granted as the petitioner has submitted no evidence to establish that the petitioner is entitled to a national interest waiver in this instance. If the petitioner had wanted to submit evidence relative to a claim of national interest, it should have submitted such evidence in response to the director's NOID. Under the circumstances, the AAO need not, and does not, consider the petitioner's unsupported assertion that the petitioner is entitled to a national interest waiver on appeal.

eligible for a national interest waiver[13] and USCIS erred in not considering the waiver in this instance.

The Form I-140, Immigrant Petition for Alien Worker, filed by the petitioner on September 28, 2012, and signed by the petitioner's Chief Financial Officer, and counsel, requests classification of the beneficiary as a "member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)," by checking box "d" in Part 2 of that form. (capitalization in original). The same form provides option "i" for an "alien applying for a National Interest Waiver (who **IS** a member of the professions holding an advanced degree or an alien of exceptional ability)." (capitalization and emphasis in original). As the petitioner selected option "d," a labor certification is required by statute and regulation. *See* Section 203(b)(2)(B) of the Act (establishing the waiver of a job offer)); 8 C.F.R. § 204.5(k)(4)(i) (labor certification requirement).

There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In summary, the offered position, as described on the labor certification, does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The AAO affirms the director's decision that the labor certification does not require a member of the professions holding an advanced degree.

The Beneficiary Possessed No Qualifying Experience Prior to the Priority Date

The record on appeal documents that, even if the plain language of the labor certification had met the requirements for classification as an advanced degree professional, the petitioner failed to establish that the beneficiary possessed the experience required for the position offered. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). As indicated above, the experience

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[13] Section 203(b)(2) of the Act provides for "aliens who are members of the professions holding advanced degrees or aliens of exceptional ability." Generally, visas in this employment preference classification are available to qualified immigrants "whose services in the sciences, arts, professions, or business are sought by an employer in the United States." Section 203(b)(2)(A) of the Act. A waiver of the job offer from an employer is provided for in Section 203(b)(2)(B)(i) when it is in "the national interest." *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 217-18 (Comm'r 1998), has set forth several factors that USCIS must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

required on the labor certification is 12 months in the position offered, Electrical Engineering Technician. The beneficiary commenced employment with the petitioner on July 5, 2005, in the position of Electrical Engineer Technician. The priority date for the instant petition is March 10, 2008. As indicated above, the labor certification states that the beneficiary held two positions prior to commencing employment with the petitioner. The beneficiary held two part-time positions with his university, NY, from August 2004 to December 2004 ("System Control Designer"), and from January 2005 to June 2005 ("Senior Design Analyst"). No other experience is provided on the labor certification.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[14] Specifically, the petitioner indicates in question H.8 that an alternate combination of

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[14] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> > (i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
>
> (i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
>
> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
>
> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

education and experience is not acceptable, and in question H.10 that experience in an alternate occupation is not acceptable. Further, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable.

In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 12 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[15] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as an "Electrical Engineer Techn," and the job duties

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> (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
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> (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.
>
> (5) For purposes of this paragraph (i):
>
> > (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
> > (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[15] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> > . . .
> > (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as the beneficiary was performing the same job duties more than 50 percent of the time. Therefore, according to DOL regulations, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, the beneficiary's experience with Polytechnic University may not be used to qualify the beneficiary for the proffered position.

The petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional with an advanced degree or skilled worker under section 203(b)(2) of the Act.

Bona Fide Job Offer

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the labor certification. 20 C.F.R. § 656.30(c)(2). The record suggests the petitioner intends to employ the beneficiary as a Computer Assisted Drafting Department Supervisor (CADDS), outside the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). As discussed above, the position offered is that of an Electrical Engineering Technician. However, the beneficiary's resume indicates that the petitioner has employed the beneficiary as a CADDS from December 2009 onward. A letter from the petitioner's Director of Engineering, dated September 25, 2012, states that the beneficiary "currently holds the title of the Computer Assisted Drafting (CAD) Supervisor." The letter indicates that the beneficiary supervises a department of at least three employees, and provides a detailed description of his employment which varies in scope and complexity from the job duties described on the labor certification for the position offered. The instant petition was filed with USCIS on September 28, 2012, after the petitioner began employing the beneficiary as a supervisor. This casts doubt on whether the petitioner continues to intend to employ the beneficiary within the terms of the labor certification. *See Matter of Ho*, 19 I&N at 591. If the petitioner does not intend to employ the beneficiary in the position offered, the instant appeal would be moot. The record does not contain independent, objective evidence that the petitioner intends to employ the beneficiary under the terms of the labor certification. *Id.* at 591-592. Therefore, the petition must also be dismissed if the petitioner intends to employ the beneficiary in a position other than the position offered on the labor certification.

Ability to Pay

The director also determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

> to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). As discussed above, if the petitioner is able to demonstrate that it is a successor-in-interest to the employer who initially filed the labor certification, [redacted] the petitioner must demonstrate both its and the labor certification employer's ability to pay the beneficiary's proffered wage during the relevant time periods. In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Here, the ETA Form 9089 was accepted on October 3, 2008. The proffered wage as stated on the ETA Form 9089 is $49,525 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a fiscal year which runs from October 1 to September 30. On the ETA Form 9089, signed by the beneficiary on January 11, 2011, the beneficiary claimed to worked for the labor certification employer from July 5, 2005. A letter from the former sole shareholder of the labor certification employer states that the beneficiary worked for labor certification employer from July 5, 2005, until its merger with the petitioner on December 2, 2009. A letter, dated July 10, 2012, from the Chief Financial Officer (CFO) of the petitioner states that it has continually employed the petitioner since December 14, 2009.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage[16] during a given period, USCIS will first examine whether the petitioner, and the labor certification employer, employed and paid the beneficiary during the relevant periods of time. If the petitioner, or labor certification employer, establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence may be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that the labor certification employer paid the beneficiary the full proffered wage from the priority date until its merger into the petitioner. The petitioner submitted Internal Revenue Service (IRS) Forms W-2 showing wages paid to the beneficiary by the initial filer as follows:

- 2008 - $54,274.08
- 2009 - No evidence of wages paid to the beneficiary by the labor certification employer[17]

If the petitioner were able to establish that it is a successor-in-interest to the labor certification employer, the 2008 W-2 form may show the ability to pay the proffered wage in that year based on wages paid to the beneficiary by the labor certification employer.

The petitioner submitted W-2 forms showing wages paid by it to the beneficiary as follows:

- 2009 - $2,001.20
- 2010 - $69,769.31
- 2011 - $69,663.93
- 2012 - $65,702.54

The petitioner also submitted pay stubs showing wages paid to the beneficiary through February 17, 2013 of $10,509.21. The pay stubs show that the beneficiary is paid a gross bi-weekly salary of $2,627.32, which would yield an annual wage of $68,310.32.

Based on the foregoing, the W-2 Forms may show the ability to pay the proffered wage in years 2008, 2010, 2011 and 2012. The W-2 Form submitted for 2009 shows wages paid to the beneficiary by the petitioner of only $2,001.20. It is noted, however, that the beneficiary was not employed by

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[16] The labor certification employer employed the beneficiary from the priority date until its merger with the petitioner on December 2, 2009. It must, therefore, be established that the labor certification employer had the ability to pay the proffered wage from the priority date until December 2, 2009. The petitioner must establish its ability to pay the proffered wage from December 2, 2009, onward.

[17] The record contains a W-2 Form which shows wages paid to the beneficiary by (FEIN . The record does not establish that this entity is in any way related to the labor certification employer or the petitioner. Those wages, therefore, will not be considered in determining the ability to pay the proffered wage by either the initial filer or the petitioner. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) ("nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.").

the petitioner until on or about December 9, 2009, the date of the petitioner's merger with the labor certification employer. However, the petitioner provided no evidence of any wages paid by the labor certification employer during 2009.

If the petitioner (or initial filer in this instance until the date of merger) does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on or about March 22, 2013, with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. As of that date, the petitioner's fiscal year 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for fiscal year 2011 return would have been the most recent return available. However, the record does not contain the petitioner's fiscal year 2011 tax return. The labor certification employer's and petitioner's tax returns demonstrate their net income for 2008 through a portion of 2011, as discussed below.

Labor Certification Employer's Net Income

- In calendar year 2008, the Form 1120S stated net income[18] of $2,908.
- In calendar year 2009, the Form 1120S stated net income of $28,812.

The labor certification employer's 2009 calendar year tax returns show insufficient net income to pay the difference between the proffered wage and any wages paid to the beneficiary. As previously noted, however, the labor certification employer paid the beneficiary wages in 2008 which exceed the proffered wage. The payment of those wages may be *prima facie* proof of the labor certification employer's ability to pay the proffered wage in 2008.

Petitioner's Net Income[19]

- In fiscal year 2009 (October 1, 2009 – September 30, 2010), the Form 1120 stated net income of ($145,161).
- In fiscal year 2010 (October 1, 2010 – September 30, 2011), the Form 1120 stated net income of ($802,567).

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[18] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 21, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions and/or other adjustments shown on its Schedules K for 2008 and 2009, the petitioner's net income is found on Schedule K of its tax returns.

[19] The petitioner is structured as a C corporation. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

Therefore, for the petitioner's fiscal years 2009, the petitioner's tax returns do not state sufficient net income to pay the proffered wage, or the difference between any wages paid and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[20] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The labor certification employer's tax returns[21] demonstrate its end-of-year net current assets, as shown below.

- In calendar year 2008, the Form 1120S stated net current assets of $69,986.
- In calendar year 2009, the Form 1120S stated net current assets of $131,866.

If the petitioner is able to establish that it is a valid successor-in-interest to the labor certification employer, then for the years 2008 and 2009, the labor certification employer's tax returns may state sufficient net current assets to pay the proffered wage.

Therefore, if the petitioner is able to establish that it is a valid successor-in-interest to the labor certification employer, the petitioner may have established its and the labor certification employer's ability to pay the proffered wage, based upon the labor certification employer's net current assets in 2009, and based upon wages paid to the beneficiary in 2008, 2010, 2011, and 2012, which exceeded the proffered wage. However, as discussed above, the record does not establish a successorship, and the petition is not currently approveable.

Conclusion

The director's decision that the labor certification does not require a member of the professions holding an advanced degree is affirmed. Beyond the decision of the director, the petitioner has not established whether: (1) it is a successor-in-interest to the labor certification employer; (2) the beneficiary is qualified for the position described on the labor certification; or (3) if a *bona fide* job existed at the time the instant petition was filed. Further, as the petitioner has not established a valid successorship, the petitioner has not overcome the director's decision that the petitioner failed to establish the ability to pay the beneficiary's proffered wage from the priority date onward.

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[20] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[21] The petitioner did not submit Schedule L of its 2009 or 2010 tax returns. The partial tax returns submitted do not show the petitioner's net current assets. Therefore, it cannot be determined whether the petitioner had sufficient net current assets to pay the proffered wage in those years.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.